UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

METALDYNE CORP. DRIVELINE
AND TRANSMISSION GROUP[1]

Employer

and Case 10-RD-1410

HENRY A. PRIEBE, AN INDIVIDUAL

Petitioner

and

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, (UAW) and its LOCAL UNION 2385[2]

Union

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Metaldyne Corp. Driveline and Transmission Group produces metal-formed components, assembly and modules for the transportation industry. The Petitioner, Henry A. Priebe, an individual, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to decertify the duly designated collective bargaining representative of the unit. [3]

A hearing officer of the Board held a hearing and the Local Union filed a brief with me, which has been carefully considered. The issues in this case are the Local and the International Unions' contention that: (1) the original petition is defective and its

[1] The Employer's name appears as amended at the hearing.
[2] The name of the Union appears as consistent with the record evidence. The International Union appeared and participated in the matter only for the purpose of moving that the petition be dismissed as untimely filed and subject to a contract bar. Local Union 2385 joins in this motion. For the reasons explicated herein, the motions to dismiss are denied.
[3] The parties are in agreement that the unit covered by the petition is co-extensive with the recognized unit.

subsequent amendment, occurring during the 60-day insulated period, is untimely and is, therefore, barred by a current collective bargaining agreement; and (2) the local Union's position that certain laid-off employees do not have a reasonable expectancy of recall and thus are ineligible to vote. Neither the Employer nor the Petitioner took a position on these issues. I have considered the evidence and arguments presented on these issues. As discussed below, I have concluded that the original filing date of the instant decertification petition, rather than its subsequent amendment, is the controlling date. Accordingly, as the original petition was timely filed, there is no contract bar to its processing. I also find that the laid-off employees in dispute have a reasonable expectancy of employment in the near future and are therefore eligible to vote. Based on these findings, I will direct an election in the agreed-upon unit.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Based upon the entire record in this matter and in accordance with the discussion above, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The International Union and its Local Union 2385 are the recognized collective bargaining representative for the agreed-upon unit. Accordingly, I find that the International Union and its Local Union 2385 are labor organizations within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of the Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. As discussed above, I have concluded that the proceedings are not barred by a collective bargaining agreement and that certain laid-off employees are eligible to vote. I also conclude that the unit encompassed by the petition, which is co-extensive with the contractually recognized unit, is appropriate for purposes of collective bargaining. To provide a context for my discussion of these issues, I will first address the issue of an asserted contract bar. In so doing, I will set forth the relevant facts, legal analysis and reasoning that support my conclusions. I will then address the issue of the voter eligibility of the laid off employees, again presenting the facts, legal analysis and reasoning that support my conclusions.

I. CONTRACT BAR

The Employer, the International Union and its Local Union 2385 are parties to a collective bargaining agreement, effective from April 2, 2000 through April 1, 2003. The original petition was filed in this matter on January 29, 2003, and named Local Union 2385 as the recognized agent. It is not disputed that the petitioner did not name the International Union as a recognized bargaining agent. On February 3, 2003 and February 5, 2003, respectively, a copy of the original petition and Notice of Representation Hearing (scheduling the matter for a hearing on February 12, 2003) was served on the parties. While neither the original petition nor the Notice of Hearing were initially served on the International Union's Detroit, Michigan headquarters, a representative of the International Union, International Representative Clarence Williams, was served at the Smyrna, Georgia business address of Local Union 2385 on February 6, 2003. The hearing in the matter was rescheduled to February 14, 2003, and, on that same date, the parties, including the same International Union representative located in Smyrna, Georgia, were served with an Order Rescheduling Hearing to February 14, 2003. At the February 14 hearing, for the first time a question was raised regarding the petition's omission of the International Union as a recognized bargaining agent, including whether service of the petition had been perfected on the International Union. Although present at the February

14 hearing, International Union Representative Clarence Williams elected not to make a formal appearance on the record. The hearing was continued on February 20, 2003. On February 14, 2003, the Region issued an Order Resuming Hearing (to February 20, 2003). All parties were served with the Order, including the International Union, both at its Detroit, Michigan and Smyrna, Georgia addresses.

At the February 20, 2003 hearing, the petition was amended to specifically include the International Union as the recognized bargaining agent along with Local Union 2385. In response thereto, the International Union filed a motion to dismiss the amended petition as being filed within the aforementioned contract's insulated period and therefore untimely. Local Union 2385 joined in that motion. The International and its Local Union argue that the February 20 amendment to include the International Union constituted a material change to the original petition and thus, tantamount to filing a new petition. Accordingly, the Unions argued that in view of the defective nature of the original petition, the Region must rely on the amended petition's, February 20 filing date as controlling for contract bar purposes. Based thereon, the Unions argued that because the petition was amended less than 60 days prior the expiration of the collective bargaining agreement, the extant collective bargaining agreement barred further proceedings. It is undisputed that the February 20 amendment to the petition took place within the current contract's insulated period which commenced on January 31, 2003.

Where there is an existing contract between an employer and an incumbent union, the decertification petition must be filed prior to the 60-day "insulated period" preceding the expiration date of the contract in order to be considered timely. In Deluxe Metal Furniture Co., 121 NLRB 995 (1958), the Board stated that the general rule is that the filing date of the original petition rather than any subsequent amendment is the controlling date, "if the employers and the operations or employees involved were contemplated by or identified with reasonable accuracy in the original petition, or the amendment does not substantially enlarge the character or size of the unit or number of

employees covered. *Dobbs International Services*, 323 NLRB 1159 (1997), citing *Deluxe Metal Furniture,* supra.

The International Union along with its Local Union 2385 is the recognized bargaining representative. Thus, it was appropriate to amend the petition to include the name of the International Union. In rejecting the Unions' argument that the amendment was a material change and, therefore, the February 20 date must be controlling for contract bar purposes, I note that the Unions do not argue that the original petition failed to identify with reasonable accuracy the employer or its operation or the employees involved nor do the Unions argue that the amendment enlarged the size of the unit. Under these circumstances and in accord with Deluxe Metal Furniture, supra, the original petition's January 29, filing date controls and the petition is timely filed. Such a finding is particularly warranted in this case where the Unions cannot show that they were prejudiced by amendment inasmuch as the International Union, through the International Representative, was put on notice since January 29 that a question concerning representation had been raised. Dobbs International Service, supra. Accordingly, the instant proceeding is not barred by the collective bargaining agreement concerned and the Unions' motions to dismiss the petition are denied.

II. LAID OFF EMPLOYEES

Local Union 2385 contends that the 35 bargaining unit employees currently on lay-off status do not have a reasonable expectancy of recall and are ineligible to vote in the election herein directed. The Petitioner, on the other hand, took the position that these employees should be deemed eligible to vote. Neither the Employer nor the International Union took a position regarding the eligibility of the laid off employees.

Seven of the 35 laid off employees had been on layoff status since March and April of 2002. Approximately 28 of the employees were laid off during the period

November 4, 2002 to January 27, 2003. Two of those employees laid off in November 2002 had been recalled as of the hearing in this matter.

Pursuant to the collective bargaining agreement with the International and its Local 2385, laid-off employees with at least two years of seniority retain their seniority and are eligible for recall for a period of two years. Laid-off employees with less than two years seniority are eligible for recall for a period of time equal to their length of service. In compliance with the collective bargaining agreement, all unit employees being laid off are advised of their recall rights in accordance with the above formula. The employees are also afforded the opportunity to identify, in writing, any position(s) for which they wish to be considered in the event of a recall. Except for four individuals whose recall rights will expire in September or October of this year, the recall rights of the remaining 31 laid off will not expire until mid to late 2004.

Notwithstanding the recall rights provided under the contract, the Local Union presented documents in support of its position that the 35 employees did not have a reasonable expectancy of recall. These documents reflected that the layoffs were due to the Employer's current economic losses. Based on those documents, it appears that at least since 2001, the Employer has experienced a decline in business (resulting in other layoffs). From 2000 to August 2002, the Employer suffered a loss of approximately $20 million. The Employer projected losing an additional $8 million in the year 2003. However, the Local Union did not provide any evidence to suggest that the Employer had future plans to make any fundamental changes in the nature or scope of its business as a result of the economic losses. Rather, the evidence established that between October 2001 and July 2002, the Employer has had 6 layoffs situations resulting in approximately 57 employees being laid off. Of those employees laid off, 42 were recalled pursuant to the terms of the collective bargaining agreement and seven employees, whose voter eligibility is in dispute, are still on layoff status. Two of the 57 laid off employees voluntarily quit, one retired and five were not recalled prior to their recall period expiring

according to the contract. Approximately 37 of the employees were recalled within four months of their lay-off. Approximately five of the recalled employees remained on layoff for a period approaching 12 months before their recall.

It is well established that lay-offs are presumed to be temporary and thus, the burden is on the Local Union to show that the 35 laid-off employees did not have a reasonable expectancy of recall, thus precluding them from being eligible to vote. In deciding whether an employee has a reasonable expectancy of recall, the Board examines a number of objective factors. Specifically, the Board evaluates the past practice of the employer regarding layoff situations, any future plans the employer has, the circumstances surrounding the layoff and what, if anything, the employees were told regarding the chances of recall. *Apex Paper Box Co*., 302 NLRB 67(1991); *Data Technology Corp.*, 281 NLRB 1005.

In the instant case, prior to November 2002, the Employer has experienced other occasions necessitating layoffs. Without exception, it appears that the Employer has adhered to the contractually provided provisions in achieving the layoffs. Likewise, the Employer has adhered to the contract in recalling and/or preserving the recall rights of 90 percent of those on layoff. The collective bargaining agreement was followed even in regard to those five employees whose recall rights expired. While it is evident that the Employer is and has been experiencing financial losses, the Local Union failed to present any evidence to show that the Employer has made or is contemplating making any fundamental change in the nature or scope of its business such that jobs will be permanently eliminated. The Local Union did not present any evidence that the Employer advised any of the 35 employees that they would not be recalled. On the contrary, as in prior layoffs, the Employer followed the same practice with these employees as it has with others, namely, laid-off employees were notified in writing, of their seniority and recall rights as guaranteed by the collective bargaining agreement. As in the past and in accordance with the contract, the 35 laid off employees were permitted

to list several jobs that they would accept, if recalled, thus dramatically increasing their chances of recall. In evaluating these objective factors, the Board places particular emphasis on an employer's past practice regarding layoffs and recall. Thus, where, as here, the evidence establishes that the Employer has a past practice of recalling virtually every laid-off employee; has adhered to the contract, as in past layoffs, and absent evidence that the Employer plans to make fundamental changes in its operation, the Local Union has failed to meet its burden warranting a finding that the laid off employees should be deemed ineligible to vote in the election**.** *Regency Service Carts*, 325 NLRB 617 (1998). Accordingly, I find that these currently laid off employees have a reasonable expectation of recall and are thus eligible voters.

6. In view of the foregoing and the record as a whole, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, mechanics, die repair, furnace, set-up, machinists, leadmen, and quality department employees employed by the Employer at is Rome, Georgia facility, but excluding office clerical employees, guards and supervisors, as defined in the Act.

III. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the International Union, United Automobile**,** Aerospace and Agricultural Implement Workers of America, (UAW) and its Local 2385. The date, time, and place of the election will be specified in

the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) and its Local Union 2385.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized. This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election only after I shall have determined that an adequate showing of interest among the employees in the unit found appropriate has been established. To be timely filed, the list must be received in the Regional Office, 233 Peachtree Street, NE, Harris Tower, Suite 1000, Atlanta, Georgia 30303 on or before March 28, 2003. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (404) 331-2858**.**

Since the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, NW, Washington, DC 20570.

This request for review must be received by the Board in Washington by 5:00 p.m. EST on April 4, 2003.

Dated at Atlanta, Georgia, this 21st day of March 2003.

/s/ Martin M. Arlook
Martin M. Arlook, Regional Director
National Labor Relations Board
233 Peachtree Street, NE
1000 Harris Tower, Peachtree Center
Atlanta, Georgia 30303

347-4010-2500
362-6766-1050